4A_418/2019[1]

Judgement of May 18, 2020

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Hohl,
Federal Judge May Canellas,
Clerk of the Court: Mr. Leemann

Parties
1. A._____ A.S.,
2. B._____ Construction Corporation
both represented by Dr. Bernhard Berger,
Appellants

v.

1. C._____ Corporation
2. Bank D._____,
both represented by Mr. Sébastien Besson and Ms. Silja Schaffstein,
Respondents

Facts:

A.
A.a. A._____ A.S. (Claimant 1, Appellant 1) with its registered office in U._____, Turkey, is a company organised under Turkish law operating in the construction sector.

B._____ Construction Corporation, V._____, Iran (Claimant 2, Appellant 2) is a company organised under Iranian law, which is likewise active in the construction sector.

C._____ Corporation, V._____, Iran (Defendant 1, Respondent 1) is a company organised under Iranian law. It is a subsidiary of E._____ Development Co., which is controlled by the Iranian Ministry of Roads and Urban Development.

[1] Translator's Note: Quote as A._____ and B._____ *v.* C._____ and D._____, 4A_418/2019. The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Bank D._____, V._____, Iran (Defendant 2, Respondent 2), is likewise a company organised under Iranian law. It is a state bank.

A.b. In 2007, the government of Mahmoud Ahmadinejad launched the "F._____ Housing Plan" in the Islamic Republic of Iran, by which roughly 2 million housing units for low income households were to be constructed over a period of five years. The Iranian Central Bank was directed to provide funding for the implementation of this plan, in the form of loans. D._____ was nominated as the sole bank to grant these loans. In the course of implementation of the project, property developers were offered construction land free of charge for construction of residential units for first-time buyers on the basis of 99-year building rights agreements.

In that context, the "G._____ Construction Project" was designed. This was the first project in which foreign investors were also allowed to participate.

On February 9, 2010, the Iranian Ministry of Housing and Urban Development, in a Memorandum of Understanding between the Iranian entity E._____ Construction Company and the A._____ Group promised support for the conclusion of agreements with the "Turkish side" ("Ministry of Housing and Urban Development of the Islamic Republic of Iran expresses its support for conclusion of agreement with Turkish side"[2]).

On April 14, 2010, the A._____ Group (referred to as the "Constructor"[3]), Defendant 1 (referred to as the "Company") and Defendant 2 (referred to as the "Bank") signed an agreement which was designated as a "Trilateral Agreement for Land Preparation and Construction of Residential Flats" ("Trilateral Agreement"). The subject matter of the initial Trilateral Agreement was the construction of 20,000 residential units as a part of the "F._____ Housing Construction Project". A question of whether Claimant 1 – as it alleges – was a party to the Trilateral Agreement was subsequently in dispute, for which reason the challenged arbitral Award always speaks of "the Turkish side" when it is referring to the parties negotiating on the side of the "Constructor".

The terms of the Trilateral Agreement are based on a form contract that was specially drafted for the above-referenced construction project. The preamble of that Agreement notes that the Agreement is being concluded with the consent of the Ministry of Economics and Finance.

The Parties' respective obligations under the Agreement are set out in Article 2. The obligation of the "Company" consists primarily of providing and preparing the construction land and paying the agreed price for each housing unit. The primary obligation of the "Constructor" consists of constructing flats pursuant to the relevant specifications. The "Bank" is, in particular, obliged to grant loans to the "Constructor".

[2] Translator's Note: In English in the original text.
[3] Translator's Note: All 'names'/'titles' in English in the original text.

Article 3.14 of the Trilateral Agreement provides that all of the obligations of the "Constructor" under the Agreement will automatically pass to an Iranian company to be formed by it. Consequently, Claimant 2 was formed on June 12, 2010.

Article 4 of the Trilateral Agreement contains the following arbitration clause:

> 1. In the event of occurrence of a dispute between a Contracting party in whose territory an investment is made and one or more investors of the other contracting party with respect to an investment, the Contracting party with respect to an investment, the Contracting Party in whose territory the investment is made and the investor(s) shall primarily endeavour to settle the dispute in an amicable manner through negotiation and consultation.
> 2. In the event that the Contracting party in whose territory an investment is made and the investor (s) are unable to agree within six months from the notification of the claim by one party to the other, the dispute can upon the request of the investor, be referred to:
> a) The competent courts of the Contracting Party in whose territory the investment is made.
> Or with due regard of their own laws and regulation to:
> b) An ad-hoc arbitral tribunal of three members established in the following manner:
> The Party to the dispute that desires to refer the dispute to the arbitration shell appoints [*sic*] an arbitrator through a written notice sent to other Party. The other party shell [*sic*] appoint an arbitrator within sixty days from the date of receipt of the said notice and the appointed arbitrators shall within sixty days from the date of the last appointment, appoint the umpire. In the event that each of the parties fails to appoint its arbitrator within the mentioned period or that the appointed arbitrators fail to agree on the umpire, each of the parties may request the President of the International Arbitral Tribunal of the International Chamber of commerce to appoint the failing party's arbitrator or the umpire, as the case may be. In any event the umpire shall be appointed amongst nationals of a country having diplomatic relations with both Contracting parties.
> 3. The arbitration shall be conducted according to the arbitration rules of the united Nations Commission on International Trade Law (UNCITRAL).
> 4. A dispute primarily referred to the competent courts of the Contracting Party in whose territory the investment is made, as long as it is pending, cannot be referred to arbitration save with the parties agreement; and in the event that a final judgement is rendered it cannot be referred to arbitration.
> 5. National courts shall not have jurisdiction over any dispute referred to arbitration.
> However, the provisions of this paragraph do not bar the winning party to seek for the enforcement of the arbitral award before national courts.
> 6. The decisions of the tribunal shall be final and binding for the parties to the dispute.[4]

Since the time of signing the Trilateral Agreement, Claimant 2 and Defendant 1 have concluded two contractual amendments on August 2, 2011, and February 14, 2012, respectively.

The construction works covered by the Trilateral Agreement are not yet completed. In the interim, 17'000 residential units have been constructed and handed over. However, various differences of opinion have arisen between the Parties.

B.

On April 5, 2017, the Claimants commenced an arbitration against the Defendants, requesting that they be adjudged liable to pay USD 150 million plus interest.

[4] Translator's Note: In English in the original text.

The Defendants first raised the objection that the Arbitral Tribunal lacked jurisdiction.

After the Arbitral Tribunal was constituted, the Parties concluded the Terms of Appointment. Pursuant to that Agreement, the arbitration was made subject to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (2010 version).

As the Parties were unable to agree as to the seat, the Arbitral Tribunal ruled that its seat was in Geneva.

Following this, the Arbitral Tribunal limited the proceedings to questions of jurisdiction and admissibility.

On October 22, 2018, an oral hearing took place in Paris. In the course of that hearing, the parties were heard as to the merits of the limited proceedings and various witnesses were examined. By Award dated July 2, 2019, the Arbitral Tribunal found that it lacked jurisdiction with respect to all of the parties and with respect to all of the claims asserted.

The Arbitrator who had been nominated by the Claimants dissented and prepared a Dissenting Opinion.

C.
By civil law appeal, the Appellants ask the Federal Tribunal to set aside the challenged arbitral Award of July 2, 2019, and to rule that the Arbitral Tribunal has jurisdiction over disputes between Appellant 2 and the Respondents under the Trilateral Agreement of April 14, 2010. As far as jurisdiction of the Arbitral Tribunal over Appellant 1 is concerned, they argue that the matter should be remanded to the Arbitral Tribunal for readjudication. In respect of the decision as to the costs of the proceedings, they argue that the matter should be remanded to the Arbitral Tribunal for readjudication.

The Respondents request the Federal Tribunal to order that the matter is not capable of appeal; in the alternative, to dismiss the Appeal. The Arbitral Tribunal has waived its right to submit comments on the Appeal.

On February 27, 2020, the Appellants submitted a Reply Brief to the Federal Tribunal, and on March 20, 2020, the Respondents submitted a Rejoinder. The Arbitral Tribunal commented on the Rejoinder by written submission dated April 9, 2020.

Reasons:

1.
According to Art. 54(1) BGG[5] the Federal Tribunal issues its decisions in an official language[6], as a rule in the language of the decision under appeal. When that decision is in another language, the Federal

[5] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organising the Federal Tribunal (RS 173.110).
[6] Translator's Note: The official languages of Switzerland are German, French and Italian.

Tribunal resorts to the official language chosen by the parties. The Award being challenged here is in English. Because that is not one of the official languages, and the Parties address their legal submissions to the Federal Tribunal in German (Appellants) and in French (Respondents), in conformity with Art. 42(1) BGG in conjunction with Art. 70(1) BV[7], the Judgement of the Federal Tribunal is being issued in the language of the Appeal Brief, as is standard practice (BGE 142 III 521[8] at 1).

2.
In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA (SR 291) (Art. 77 (1)(a) BGG).

2.1. The seat of the Arbitral Tribunal in the present case is located in Geneva. At the time in question, all of the Parties had their registered offices outside Switzerland (Art. 176(1) PILA). As the parties have not expressly excluded the application of Chapter 12 PILA, the provisions of that chapter are applicable (Art. 176(2) PILA).

The challenged arbitral Award by which the Arbitral Tribunal found that it lacked jurisdiction was a final award (BGE 143 III 462[9] at 3.1, p.466). Pursuant to Art. 190(2) PILA, such final awards may be challenged by civil law appeal.

2.2. In their Answer to the Appeal, the Respondents assert that the appeal is inadmissible from the outset, because, in Art. 4(5) and (6) of the Trilateral Agreement, the Parties completely excluded any challenge of the Award before the Federal Tribunal under Art. 192(1) PILA.

The Appellants rightly counter this objection by noting that in respect of any potential waiver of legal remedies, one must first examine whether the disputed clause constitutes a valid arbitration agreement at all, which is a controversial question in the case under appeal.

2.3. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e.* it may only seek the setting aside of the decision under challenge (*see* Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to adjudicate the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, however, there is an exception in this respect, providing that the Federal Tribunal may itself rule on the arbitral tribunal's jurisdiction or the lack thereof or on the removal of the arbitrator involved (BGE 136 III 605[10] at 3.3.4 p. 616 with references). It likewise cannot be ruled out that the Federal Tribunal will remand

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[7] Translator's Note: BV is the most commonly used German abbreviation for the Swiss constitution.
[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network
[9] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-98-2017
[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

the matter to the arbitral tribunal (Judgements 4A_294/2019[11] of November 13, 2019, at 2.2; 4A_462/2018 of July 4, 2019, at 2.2; 4A_628/2018[12] of June 19, 2019 at 2.2.).

Accordingly, the applications of the Appellants are admissible.

2.4. Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[13] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282). According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5, p187, with reference). Criticism of an appellate nature is inadmissible (BGE 134 III 565[14] at 3.1, p.567; 119 II 380 at 3b, p.382).

2.5. The Federal Tribunal bases its judgements on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This includes the findings as to the facts upon which the dispute is based and those concerning the proceedings of courts of first instance, *i.e*. the findings as to the contents of the case which include, in particular, the submissions of the parties, their factual allegations, their legal arguments, statements in the case, evidence and proffers of evidence, the content of a witness statement or expert report, or the findings as to a visual inspection (BGE 140 III 16 at 1.3.1. with references).

The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even where they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). Even in cases of jurisdictional objections, it will only review the factual findings of the arbitral award when some admissible grievances within the meaning of Art. 190(2) PILA are raised against them or, exceptionally, where new evidence (Art. 99 BGG) is taken into consideration (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477[15] at 3.1, p. 477; 138 III 29[16] at 2.2.1; each with references).

3.
Invoking Art. 190(2)(b) PILA (SR 291), the Appellants assert the grievance that the Arbitral Tribunal wrongly found that it lacked jurisdiction.

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[11] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-294-2019-4a-296-2019

[12] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-628-2018

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

3.1. The Arbitral Tribunal considered Art. 176 *et seq* PILA to be applicable, and examined the validity of the disputed arbitration clause also in substantive respects under Swiss law, since all of the parties' arguments had been based exclusively on that legal system. Referring to Art. 18(1) OR , the Arbitral Tribunal stated that it was first necessary to establish the actual common intent of the parties (subjective interpretation). If such actual intent could not be established, then the disputed clause should be interpreted in good faith from the perspective of the recipient of the declaration.

The arbitration clause at issue here, from Art. 4 of the Trilateral Agreement, was, the Arbitral Tribunal stated, generally very carefully drafted, for which reason it is not a 'pathological' clause in the usual sense of that term but it nevertheless conflicts with the other provisions of the Trilateral Agreement. The difficulties in interpretation are not due to ambiguities of terms but rather that the wording, which appears at first relatively clear, is in no way compatible with the agreement in which it is incorporated. This manifest contradiction between the wording in the main agreement and that of the arbitration clause cannot, the Arbitral Tribunal noted, be overlooked even by a layman without any legal training. Obviously, the wording of the arbitration clause has no nexus with the Trilateral Agreement, but rather relates, they stated, to other parties and other disputes. There are, the Arbitral Tribunal found, thus doubts as to the actual intentions of the Parties in respect of disputes arising out of the Trilateral Agreement. Accordingly, the actual intent of the Parties to resolve their disputes must be first ascertained on the basis of the wording of the clause and on the basis of other elements, in particular the history of the Parties' negotiations.

The wording of the arbitration clause in Art. 4 of the Trilateral Agreement is, the Arbitral Tribunal noted, almost identical to Art. 11 of the Bilateral Investment Protection Agreement between Turkey and the Islamic Republic of Iran in the year 1996 (ISA 1996), which constituted an offer by the contracting states to investors of the other party to the convention to submit investment-related disputes to arbitration:

> ARTICLE 11
> Settlement of Disputes Between A Contracting Party and Investor of the Other Contracting Party
> 1. In the event of occurrence of a dispute between a Contracting Party in whose territory an investment is made and one or more investors of the other Contracting Party with respect to an investment, the Contracting Party in whose territory the investment is made and the investor (s) shall primarily endeavour to settle the dispute in an amicable manner through negotiation and consultation.
> 2. In the event that the Contracting Party in whose territory an investment is made and the investor (s) are unable to agree within six months from the notification of the claim by one party to the other, the dispute upon the request of the investor, be referred to
> (a) the competent courts of the Contracting Party in whose territory the investment is made, or with due
> regard of their own laws and regulations to:
> (b) the ad hoc arbitral tribunal of three members established in the following manner:
> The Party to the dispute that desires to refer the dispute to the arbitration shall appoint an arbitrator through a written notice sent to the other Party. The other party shall appoint an arbitrator within sixty days from the date of receipt of the said notice and the appointed arbitrators shall within the sixty days from the date of the last appointment, appoint the umpire. In the event that each of the parties fails to appoint its arbitrator within the mentioned period or that the appointed arbitrators fail to agree on the umpire, each of the parties may request the President of the International Arbitral Tribunal of the International Chamber of Commerce to appoint the failing party's arbitrator or the umpire, as the case may be. In any

> event the umpire shall be appointed amongst nationals of a country having diplomatic relations with both Contracting Parties.
> 3. The arbitration shall be conducted according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
> 4. A dispute primarily referred to the competent courts of the Contracting Party in whose territory the investment is made, as long as it is pending, cannot be referred to arbitration save with the parties agreement; and in the event that a final judgement is rendered it cannot be referred to arbitration.
> 5. National courts shall not have jurisdiction over any dispute referred to arbitration. However, the provisions of this paragraph do not bar the winning party to seek for the enforcement of the arbitral award before national courts.
> 6. The decisions of the tribunal shall be final and binding for the parties to the dispute.[17]

This similarity explains why the arbitration clause in Article 4 does not refer to the Trilateral Agreement or to disputes arising out of or in connection with that Agreement or its parties, but rather uses words commonly found in bilateral investment protection agreements. Accordingly, it follows from its wording that the clause does not refer to the parties to the Trilateral Agreement (not even indirectly or in rudimentary terms) nor to the dispute arising out of the Trilateral Agreement and/or its parties. Rather, what it requires – like most arbitration clauses in bilateral investment protection treaties – is that the party submitting a dispute to *ad hoc* arbitration is an investor. Although at first blush, one might be tempted to equate the term "investor" under the ISA 1996 with the term "constructor" in the Trilateral Agreement, the contradictions are too great for such a broad gloss on that term. The dispute described in Article 4 relates neither to "the Company" (Respondent 1) nor to "the Bank" (Respondent 2) as parties to the Trilateral Agreement, but rather to "the Contracting party in whose territory an investment is made". This obviously refers to a state, as the construction work covered by the Trilateral Agreement is to be carried out in Iran; one might understand the Islamic Republic of Iran to be the contracting party in whose territory an investment is made. Moreover, the arbitration clause clearly circumscribes certain disputes subject to arbitration by reference to their subject matter and parties: "dispute between a Contracting Party in whose territory an investment is made and one or more investors of the other Contracting Party with respect to an investment". This leaves no doubt that a "Contracting Party" is a state with its own court system and not a public undertaking such as the Respondents. It would be pointless to ask the "competent courts of Bank D._____" or the "competent courts of C._____ Corporation" to speak. Nor can the terms used in Article 4 be simply bent to fit the main Agreement. The wording of the arbitration clause in Article 4 does not indicate the intention of the Parties to the Trilateral Agreement to refer the disputes under that Agreement to arbitration under the UNCITRAL Rules. However, subjective interpretation cannot be limited to the mere wording of the disputed clause, let alone to an assessment which is isolated from the rest of the contract; rather, the fact that this clause is found in the Agreement must be regarded as an element to be taken into account. Since the wording is inconclusive, the evidence relating to the parties' contract negotiations must be included in the assessment. The negotiations were concluded on the Turkish side by H._____ (who has legal training) and on the part of Respondent 1/its parent company by I._____ (who has no legal training). By contrast, Respondent 2 did not take part in the negotiations.

[17] Translator's Note: In English in the original text.

The evidence from the file leaves no doubt that up until the time of Respondent 1's final offer, the parties were unable to reach any arbitration agreement. As regards the first dispute settlement clause, Respondent 1 proposed the following to the Turkish side:

> Article 4 - Dispute Settlement:
>
> Any dispute between the company and the constructor in this agreement shall be settled by the parties amicably in the first place; otherwise an arbitration committee consisting of agents of the parties plus a technical expert mutually agreeable appointed on the basis of the laws of both parties and in case of absence of any special covenants on the basis of the regulations of the Islamic Republic of Iran and the decision of the committee shall be binding upon the parties.[18]

The Turkish side had rejected the proposal of Respondent 1 because this was considered to constitute a flawed, internal arbitration agreement. At the time of the oral hearings, H._____ is said to have stated that he had heard that some large Turkish companies wishing to do business in Iran had gotten into difficulties in cases involving disputes and that they could only have recourse to the Iranian courts. To avoid this, he insisted on the inclusion of an international arbitration clause in the Agreement.

The Turkish side then proposed the following clause, drafted by H._____, to Respondent 1:

> Article 4 - Dispute Settlement:
>
> In the event of occurrence of a dispute between the parties, the parties shall primarily endeavor [*sic*] to settle the dispute in an amicable manner through negotiation and consultation. If the parties are unable to agree within six months from the notification of the claim by one party to other, the dispute shall be referred to an ad-hoc arbitral tribunal of three members established in the following manner: The party to the dispute that desires to refer the dispute to the arbitration shall appoint an arbitrator through a written notice sent to the other party. The other party shall appoint an arbitrator within sixty days from the date of receipt of the said notice and the appointed arbitrators shall within sixty days from the date of last appointment, appoint the umpire. In the event that each of the parties fails to appoint its arbitrator within the mentioned period or that the appointed arbitrators fail to agree on the umpire, each of the parties may request the President of the International Arbitral Tribunal of the International Chamber of Commerce to appoint the failing party's arbitrator or the umpire, as the case may be. In any event the umpire shall be appointed amongst nationals of a country having diplomatic relations with Turkey and Iran. The arbitration shall be conducted according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The decisions of the tribunal shall be final and binding for the parties to the dispute.[19]

This clause was rejected by Respondent 1. Its reaction could not have come as a surprise to the Turkish side, particularly as it was well known that international arbitration is not considered an accepted dispute resolution mechanism for public entities in Iran and under the Iranian Constitution, special authorisation is required to pursue it (Art. 139 Iranian Constitution). For the Iranian side, the only form of arbitration which was acceptable is purely domestic arbitration, in which an "official court expert" is appointed as

[18] Translator's Note: In English in the original text.
[19] Translator's Note: In English in the original text.

chair. The Turkish proposal was for a genuinely international arbitral tribunal based outside Iran or Turkey. This difference was said to be of substantial significance to both sides. From the Turkish point of view, an arbitral tribunal in Iran with an Iranian official linked to the Iranian judiciary and the possibility of contesting the decision in an Iranian court would not be fundamentally different from settling disputes in an Iranian state court. On the other hand, the Iranian side was firmly opposed to an international arbitral tribunal based outside Iran. This is unsurprising, particularly since Respondent 1 is a subsidiary of a state enterprise controlled by the Ministry of Roads and Urban Development.

Against this background, the difference between the two proposed methods of dispute settlement was so fundamental that the offer of an internal arbitral tribunal in Iran and the counter offer of an international arbitral tribunal abroad could not have ever resulted in convergence of party intent. The legal, practical, cultural and psychological implications of the two proposed dispute resolution methods were simply too far apart.

Finally, when Respondent 1 ultimately proposed the text of Article 4 of the Trilateral Agreement, the Turkish side immediately realised that this clause did not fit the Agreement and therefore did not constitute an international arbitration agreement for disputes under the Trilateral Agreement. For this reason, H._____ proposed changes to the wording to make disputes under the Trilateral Agreement subject to the arbitration agreement, but this was rejected. In any event, the proposed Article 4 did not imply any change of position on the part of Respondent 1 in the sense that it had now agreed to the proposal of the Turkish side (dispute settlement by internal arbitral tribunal). Respondent 1 had presented the last version as one having been imposed by a higher authority and not as a concession to the Turkish position. Had Respondent 1 wanted to submit to international arbitration in line with the intention of the Turkish side, it would not have insisted on its wording and would not have refused to adequately designate the parties to the arbitration agreement.

The Arbitral Tribunal found that there was no clear intention of Respondent 1 to submit future disputes with the Appellants under the Trilateral Agreement to an international arbitral tribunal. The Turkish side should not have understood the “bizarre diktat” that had been imposed on it as constituting acceptance of what it had been trying to achieve all along, namely to insert an international arbitration clause into the Trilateral Agreement. To the contrary: the Turkish side was confronted with a so-called dealbreaker of having to sign the Trilateral Agreement without an appropriate dispute settlement clause, because the clause proposed by Respondent 1 was not negotiable and rejection of it would have meant the collapse of the negotiations. The Turkish side had rejected the proposed provision with its clear and customary meaning, and was aware that the clause did not cover disputes arising out of the Trilateral Agreement. For this reason, it had tried to adapt or “harmonise” the wording proposed by Respondent 1. Obviously, the Turkish side had not understood the proposal in the sense that that wording proposed to submit disputes of the Parties under the Trilateral Agreement, in line with the desire of the Turkish side, to arbitration under the UNCITRAL Rules. H._____, the representative for the Turkish side, had legal training and very well understood the contract terms regarding dispute resolution. His initial testimony, which was confirmed in the oral hearings, left no remaining doubts as to the fact that he had recognised that the clause in Article 4 did not cover disputes arising under the Trilateral Agreement.

On the basis of subjective interpretation, it should be noted that according to the (*de facto*) understanding of the arbitration clause in Article 4, taking into account all the circumstances (such as the wording of the clause, its incorporation into the Agreement and the various positions of the Parties during contract negotiations), it was not intended for jurisdiction over disputes of the Parties to the Trilateral Agreement to be vested in an international arbitral tribunal. Given the outcome of this subjective interpretation, there is no room for objective interpretation; normative interpretation is only required where it is impossible to establish the actual meaning of the agreement and thus it is necessary to discern the meaning of the contract in good faith from the point of view of a reasonable person. Nor could anything be inferred in favour of the Appellants from the principle of *contra proferentem* (rule of ambiguity), particularly since that principle does not apply if the disputed contract provisions were clear and understood by the parties. There was no doubt that at the time of signing the Contract, all three parties involved understood the arbitration clause in Article 4 of the Trilateral Agreement such that it was not intended to refer disputes under the Trilateral Agreement to arbitration under the UNCITRAL arbitration rules.

3.2.
3.2.1. Pursuant to Art. 190(2)(b) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal issues, including preliminary substantive issues upon which the determination of jurisdiction depends (BGE 144 III 559 at 4.1 p. 563; 142 III 239 at 3.1; 134 III 565 at 3.1; 133 III 139 at 5 p. 141). By contrast, the Federal Tribunal will only review the factual findings of the award under appeal in the context of an appeal on jurisdiction where some admissible grievances within the meaning of Art. 190 (2) PILA are raised against such factual findings or when some new evidence (Art. 99 BGG) is, exceptionally, taken into account (BGE 144 III 559 at 4.1 p.563; 142 III 220 at 3.1, 239 at 3.1; 140 III 477 at 3.1; 138 III 29 at 2.2.1; each with references).

Pursuant to Art. 178 (2) PILA, the validity of an arbitration agreement in substantive respects and as to its objective scope is governed by the law chosen by the parties as applicable to their dispute, in particular the law applicable to the main contract, or Swiss law (BGE 140 III 134 at 3.1; 138 III 29 at 2.2.2). The Federal Tribunal interpreted the arbitration clause of Article 4 of the Trilateral Agreement under Swiss law. The Parties are in agreement that the interpretative principles of Swiss law apply. The Respondents do not, for example, rely on provisions from any foreign legal system which would potentially be applicable in this specific case and which would be more advantageous than Swiss law in terms of the substantive validity of the arbitration clause.

3.2.2. The interpretation of an arbitration agreement follows the generally applicable principles of interpretation governing private declarations of intent. What is thus decisive is, first of all, identifying the common and actual intent of the parties (BGE 142 III 239 at 5.2.1; 140 III 134 at 3.2, p.138; 130 III 66 at 3.2, p.71 with references). This subjective interpretation is based on the assessment of the evidence which, as a general principle, is excluded from the scope of the Federal Tribunal's review (BGE 142 III 239 at 5.2.1 with references). Where no actual intent of the parties can be ascertained in respect of the arbitration agreement, the arbitration clause should be interpreted based on the principle of reliance, *i.e.* the presumed intent of the parties should be determined as that which could and should have been understood by the respective recipient of the declaration in good faith (BGE 142 III 239 at 5.2.1; 140 III 134 at 3.2; 138 III 29 at 2.2.3). If the result of judicial interpretation is that a valid arbitration agreement is

present, then there will be no cause to interpret it restrictively; rather, the presumption will be that the parties desire to vest comprehensive jurisdiction in the arbitral tribunal (BGE 140 III 134 at 3.2, p.139; 138 III 681 at 4.4, p.687; 116 Ia 56 at 3b; each with references).

3.2.3. The Federal Tribunal is, first, unable to follow the argument of the Appellants that the Federal Tribunal is free to examine the question of whether the Arbitral Tribunal incorrectly found that it lacked jurisdiction not only in legal respects but also in factual respects. Contrary to the view expressed in the Appeal Brief, one cannot infer from the wording in Art. 190(2)(b) PILA ("the decision may only be challenged […] if the Arbitral Tribunal has wrongly found that it has jurisdiction or that it lacks jurisdiction") that an arbitral award on jurisdiction could be freely reviewed in factual respects. The binding nature of the facts established by the contested decision on the Federal Tribunal also arises in the context of an arbitration appeal under Art. 105 (1) BGG, whereas the correction or supplementation of facts established in the arbitral proceedings, as provided in Art. 105(2) BGG, is excluded under Art. 77(2) BGG.

Contrary to what the Appellants appear to assume, no arguments in their favour can be inferred from the jurisprudence of the Federal Tribunal holding that state courts are required to "comprehensively review" the question of jurisdiction under Art. 190(2)(b) PILA (BGE 117 II 94 at 5a, p.97), and/or to render decisions "as a last resort" (BGE 120 II 155 at 3b/bb, p.164). Even in the decisions cited, the Federal Tribunal did not, for example, presume that it was free to examine the findings of fact made by the arbitral tribunal, but rather held that the question of jurisdiction must be reviewed in legal respects – including all of the preliminary questions of substantive law – through application of free cognition. Already at that time, the Federal Tribunal had expressly emphasised that a free review of the findings of fact even in the realm of jurisdiction is impermissible (BGE 119 II 380 at 3c, p.383). More recently, as well, the Federal Tribunal has refused, in respect of the jurisdictional question, to freely review factual findings of the arbitral tribunal, expressly holding that such reviews will only be considered possible in appellate proceedings before the Federal Tribunal where grievances under Art. 190(2) PILA against the findings of fact in the arbitral tribunal's jurisdictional decision are raised or where, exceptionally, new evidence is considered (BGE 144 III 559 at 4.1, p.563; 142 III 220 at 3.1, 239 at 3.1; 140 III 477 at 3.1). There is no cause for us to depart from this jurisprudence, which has been confirmed on multiple occasions. Accordingly, the arguments in the Appeal Brief that, in the case under decision here, it would be permissible to voice criticisms of an Appellate nature regarding the deliberations of the Arbitral Tribunal, are not tenable (see also BGE 142 III 239 at 3.1, p. 244).

Because the Appellants have not raised admissible grievances under Art. 190(2) PILA against the findings of fact in the challenged arbitral award, the Federal Tribunal is required to base its assessment of the case on the findings of fact in the challenged award.

3.2.4. The Appellants wrongly accuse the Arbitral Tribunal of failing to take account of the actual intent of the parties but rather having carried out an objective interpretation of the arbitration agreement. The Federal Tribunal is unable to follow them if they wish to deduce from an isolated consideration of the decision on costs that the challenged decision on jurisdiction was in reality not based on subjective interpretation but on an objective one (margin no. 187: "*The Arbitration Clause in Article 4 of the Trilateral Agreement, the wording of which was imposed by Respondent 1, raised a problem of interpretation.*

Claimants may have in good faith believed that, since this clause was inserted in the Trilateral Agreement, one could argue that it applied to disputes under this Agreement, notwithstanding the fact that the persons mentioned therein were other persons, and the fact that Respondent 1 had repeatedly objected to the very idea of an arbitration outside Iran under the UNCITRAL Arbitration Rules"). The consideration in question relates directly to apportioning of costs and, contrary to what the Appellants appear to assume, relates solely to their conduct in the arbitration proceedings in that the Arbitral Tribunal considered their arguments in the arbitration to be compatible with the principle of good faith ("Claimants may have in good faith believed that […] one could argue that […]"). Thus, the issue here is not the (normative) meaning of the clause at the time of contracting, but rather the actions of the Claimant during the arbitration, of which the Arbitral Tribunal would take account in apportioning the costs of the proceedings. It would be wrong to infer from this consideration in respect of the decision as to costs that, despite a detailed review of the question of the actual meaning of the arbitration clause in Article 4 at the time of concluding the Trilateral Agreement, the Arbitral Tribunal failed to take any subjective interpretation, but rather an objectivised one. With their objection that the consideration in question on apportionment of costs is in "blatant conflict" with the findings on the merits, the Appellants do not raise a grievance which is admissible under Art. 190(2) PILA.

It should be added that the Arbitral Tribunal did not accuse the Appellants (contrary to their arguments) of not wanting Article 4 to be applicable to disputes under the Trilateral Agreement at the time of concluding that Trilateral Agreement, but rather it found that the representative who was entrusted with the contract negotiations at the time had recognised that Respondent 1 did not have the intent to agree to dispute resolution by international arbitral tribunal.

3.2.5. Starting with the wording of the contract, and taking account all of the circumstances under which the contract was concluded, the Arbitral Tribunal, after conducting an assessment of the evidence submitted and hearing the witnesses at the oral hearing of October 22, 2018, found that Respondent 1 did not intend to submit disputes between the Parties to the Trilateral Agreement to an international arbitral tribunal and that the Turkish side, with its representative H._____, was aware of this at the time of contracting. This is a finding of fact in connection with a subjective interpretation which is not susceptible to any free review in Appellate proceedings before the Federal Tribunal (see BGE 144 III 93 at 5.2.2, p.98; 142 III 239[20] at 5.2.1, p. 253; see also, e.g., Judgement 4A_136/2015[21] of September 15, 2015, at 2.2.2 and at 2.2.3.1 *Op. Cit.*). Grievances regarding the findings of fact which would be admissible under Art. 190(2) PILA are not raised in the Appeal Brief.

If the representative of the Turkish side was aware at the time of contracting that Respondent 1 did not wish to submit disputes of the Parties arising under that contract to an arbitral tribunal based outside Iran with the proposed wording of Article 4 of the Trilateral Agreement, then no agreement was reached, but rather there was an open dissent on this point (see BGE 144 III 93 at 5.2.1). This does not leave any room under these circumstances for an objective interpretation of the clause under the principle of

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[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

[21] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/proper-interpretation-arbitration-clauses

reliance, for which reason the Arbitral Tribunal correctly declined to carry out any relevant investigations (as to the scope of application of contract interpretation under the principle of reliance BGE 144 III 93 at 5.2.3, p.98-99). The Appellants fail to recognise this where they admit, on the one hand, that the Arbitral Tribunal assumed that there was an open disagreement of the Parties, but at the same time claim that the Arbitral Tribunal should have proceeded to carry out a normative (objective) interpretation under the principle of reliance by way of a second step. If the Turkish side had really understood Respondent 1 to be saying that it thus did not intend any jurisdiction to be vested in an arbitral tribunal seated abroad for disputes of the Parties under the Trilateral Agreement, then it could not, in good faith, have accorded any other meaning to that contract clause (see Judgement 4A_279/2019 of February 19, 2020 at 4.3.1; 4A_187/2015 of September 29, 2015 at 4.1, not published in: BGE 141 III 489; 4A_388/2012[22] of March 18, 2013 at 3.4.3). Because subjective interpretation had already yielded a result, this also left no room for the ambiguity rule argued by the Claimants, which the Arbitral Tribunal correctly noted (see BGE 142 III 671 at 3.9, p.682; 133 III 61 at 2.2.2.3, p.69).

The objection of the Appellants that the Parties were, at least, in agreement in principle that disputes under the Trilateral Agreement should be submitted to an arbitral tribunal misses the point. The Arbitral Tribunal has shown in a logically coherent manner that the differences between international arbitration (with a tribunal seated outside of Iran) and internal arbitration which is not independent of the justice system of the Islamic Republic of Iran and which did not, from the perspective of the Turkish side, differ significantly from dispute resolution by the state courts of Iran, was of significance to both sides. The Arbitral Tribunal correctly concluded from this that the offer of dispute resolution by an arbitral tribunal seated in Iran, on the one hand, and the counter offer of vesting jurisdiction in an international arbitral tribunal seated abroad, would lead to no consensus of the Parties (see Art. 2(1) OR).

3.2.6**.** With respect to Respondent 2, who did sign the Trilateral Agreement but who did not participate in the relevant contract negotiations, the Appellants refer to the grievances they have already raised against contract interpretation, but which have been revealed as unsound. The Appellants are right not to assert that, based on a different declaration made to Respondent 2, one would have to assume a different interpretative result as compared with Respondent 1.

3.3. It follows that the interpretation of the Arbitral Tribunal is not legally objectionable. To the extent that the Appellants criticised the Arbitral Tribunal's subjective interpretation, which is based on its assessment of the evidence, these arguments cannot be entertained. If the interpretation of the arbitration clause in Article 4 of the Trilateral Agreement showed that that clause did not mean that disputes between the Parties under that Agreement should be submitted to an arbitral tribunal based outside Iran, the Geneva-based Arbitral Tribunal correctly found that it lacked jurisdiction.

[22] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/jurisdiction-arbitral-tribunal-decision-lausanne-court-arbitration-sport

4.
The appeal is rejected, to the extent the matter is capable of appeal. In line with the outcome of these proceedings, the Appellants shall be liable jointly and severally for costs and party compensation (Art. 66(1) and (5) and Art. 68(2) and (4) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is rejected, to the extent the matter is capable of appeal.

2.
The judicial costs in the total amount of CHF 200'000 shall be paid by the Respondents (with joint and several liability and at a rate of one half each).

3.
The Appellants shall pay party compensation to the Respondents in the amount of CHF 220'000 for the proceedings before the Federal Tribunal (with joint and several liability and at a rate of one half each).

4.
This decision shall be notified in writing to the parties and to the Arbitral Tribunal with its seat in Geneva.

Lausanne, May 18, 2020

In the name of the First Civil Law Court of the Swiss Federal Tribunal

Presiding judge:	Clerk of the Court:
Kiss	Leemann (Mr.)